PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

89-1004

Supreme Court, U.S.
FILED
NOV 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACE MELTON DELANEY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari
to the Court of Appeal
of the State of California:
Third Appellate District

JAMES MITCHELL FALLMAN, JR.,
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QUESTION PRESENTED

WHETHER CALIFORNIA'S SCHEME FOR MAKING VENUE MANDATORY IN SACRAMENTO COUNTY FOR TRIALS OF MEDI-CAL FRAUD VIOLATES THE SIXTH AMENDMENT GUARANTEE TO A FAIR TRIAL IN THE PROPER VICINAGE.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
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HORACE MELTON DELANEY,
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THE PEOPLE OF THE STATE OF CALIFORNIA,
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On Petition for a Writ of Certiorari
to the Court of Appeal of the
State of California:
Third Appellate District

PETITION FOR WRIT OF CERTIORARI

The petitioner, H. M. DELANEY, respectfully requests that a writ of certiorari issue to review the judgment of the Third District Court of Appeal of the State of California filed on May 23, 1989 and thereafter denied review

by the California Supreme Court on August 23, 1989. The Third District Court of Appeal of the State of California affirmed petitioner's conviction from the Sacramento County Superior Court on various counts of Medi-Cal/Welfare fraud.

OPINION BELOW

A copy of the one-page opinion denying review of the Supreme Court of California is attached hereto as Appendix A. A copy of the memorandum and decision of the Third District Court of Appeal is attached hereto as Appendix B at the end of this brief.

JURISDICTION

Jurisdiction is claimed pursuant to 28 USCS 1257(3). On or about August 23, 1989, the California Supreme Court denied petitioner's petition for review concerning the opinion of the Third District Court of

Appeal which issued on May 23, 1989, affirming petitioner's conviction by the Sacramento Superior Court on ten counts of presenting false Medi-Cal claims and one count of grand theft and an enhancement for taking property in excess of $25,000.00.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Six provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State - and District (emphasis added) wherein the crime shall have been committed..."

STATEMENT OF THE CASE

Petitioner does not contend that the acts he was accused of did not occur. He does contend that by being forced to defend himself in Sacramento County in

which less than one percent of the acts necessary to make up the crimes which occurred violates the spirit of the vicinage clause of the Sixth Amendment. The acts of Medi-Cal fraud occurred in greatest part both in Southern California at elderly care hospitals and in San Francisco where the petitioner's office was and where literally boxes of evidence were. Forcing petitioner to trial in Sacramento merely for the convenience of the Attorney General on the ground that all Medi-Cal vouchers ultimately had to be submitted in Sacramento, the State Capitol, where they were administratively processed, made it extremely difficult for petitioner to bring forth his witnesses and for him and his attorney to have access to a majority of the

evidence and for other potential witnesses (elderly persons at old folks homes who were too ill and feeble) to travel from Southern California to Central California, Sacramento, for trial.

As such, petitioner did not have a trial of his peers within the spirit of the vicinage clause of the Sixth Amendment in the "District where the crime occurred." A vast majority of the acts which would constitute the criminality occurred in Southern California and in San Francisco County, either of which petitioner would not dispute as being alternative proper venues within the meaning of the Sixth Amendment vicinage clause, but being forced to defend in Sacramento merely because the State of California deputized a private corporation to receive those vouchers in the County of Sacramento for

administrative convenience at the State Capitol, deprived petitioner of putting on all of his potential witnesses and having access to much of the evidence and as such he should have been granted a new trial in the proper venue either in a Southern California County where the elderly witnesses would be available or in San Francisco County where over ninety-nine percent of the physical evidence was located. The Federal Sixth Amendment vicinage issue was first raised in the Trial Court and thereafter in the California Third District Court of Appeal and finally in the California Supreme Court.

REASONS FOR GRANTING THIS WRIT

I. Petitioner did not have a proper trial in the proper district that he is entitled to within the meaning of the vicinage clause of the Sixth Amendment of the U. S. Constitution.

The State of California concedes that the Sixth Amendment vicinage requirements are obligatory on the State via the 14th Amendment due process clause in the case of People v. Jones, 9 C. 3d 546; 108 Cal Rptr 345, 510 P. 2d 705, citing Duncan v. Louisiana, 1968, 391 US 145, 149 (20 L. Ed. 2d 491, 496, 88 S.Ct. 1444) and Williams v. Florida, 399 U.S. 78, 100 (1970).

The Supreme Court of California goes on to state in the Jones case supra at page 551 that, "...A criminal defendant in a State criminal prosecution has a Constitutional right to be tried by a jury drawn from, and comprising a representative cross-section of, the residents of the district wherein the crime shall have been committed. " See People v. Jones supra

at page 551.

Generally, the U.S. Supreme Court at an early point in time, has defended the right of a defendant in a criminal case to have his trial be not only heard by a jury, but by a proper jury. See Glasser v. United States (1942), 315 U.S. 60, 85 (86 L. Ed. 680, 707, 62 S. Ct. 557). By way of analogy, in the federal court system, venue has been treated as a matter of convenience rather than as a right of the defendant in civil matters. However, in criminal cases, the accused has the right as a matter of Constitutional magnitude to be tried where the alleged crime was committed. See United States v. Stratton, 649 F. 2d 1066 (5th Circuit 1981).

It cannot be said that forcing

petitioner to trial in an incovenient county far from a majority of the potential witnesses is harmless error beyond a reasonable doubt within the meaning of Chapman v. California (1967), 386 US 18, 23 (17 L. Ed. 2d 705, 710).

It has been said that the Sixth Amendment applies to the rights of the accused, not the rights of the States. See State ex rel Knox v. Shelby County Superior Court, 259 Ind 554 (1972) 290 N.E. 2d 57. The California Supreme Court, itself, talked about the common law right of a jury from the proper vicinage in the case of People v. Powell, 87 C 348 at pgae 357 thereof where it was stated as follows, "...The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will

thus have the benefit, on his trial, of his own good character and standing with his neighbors (emphasis added), if these he has preserved and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty, to secure the attendance of his own witnesses." See People v. Powell supra at page 357 citing Cooley on Constitutional Limitations, 5th Edition at page 390-393.

It would appear from the definition of Mr. Cooley cited by the California Supreme Court, itself, at an early date in the Powell opinion (January 1981) that the common law vicinage concept of where the crime occurred was also tied to a jury of the accused's "neighbors"

so that the fairness of his trial would also take in his character if he had developed any such character with his peers and the common law must have envisaged fundamental notions of fairness as to attendance of witnesses as per the above citation by the California Supreme Court from Mr. Cooley, supra. This is precisely what petitioner did not get, namely, availability of elderly, feeble witnesses from the old folks home in Southern California.

Venue and its corollary, vicinage, are in criminal cases at least, far more than procedural niceties and are matters that deserve Constitutional protection. See U.S. v. Partin, D.C. La (1970), 320 F. Supp. 275. In petitioner's case, the actual fraudulent acts in vast proportion

occurred in Southern California and in San Francisco at petitioner's office. Only by a stretch of the imagination can it be said that the crimes occurred in Sacramento where the vouchers were mailed to any degree other than perhaps a miniscule percent. A State case has raised what petitioner considers to be a reasonable analogy. The Montana Supreme Court has stated that the Sixth Amendment of the U.S. Constitution contemplates actual rather than constructive venue. See State v. Preite (1977), 564 P. 2d 598, 172 Mont 318.

Petitioner alleges that the venue at best in Sacramento County was constructive venue within the meaning of the Montana Supreme Court reasoning above and in violation of the protections and safeguards

of the Sixth Amendment vicinage requirement so that petitioner would have fair access to his witnesses and to his evidence.

CONCLUSION

Wherefore it is respectfully requested that the writ of certiorari issue to the end that the State of California be compelled to re-try petitioner in a fair and proper venue, either in San Francisco County or in a Southern California county where the crime occurred so that a proper trial may be had within the meaning of the Sixth Amendment vicinage clause.

Respectfully submitted,

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APPENDIX

APPENDIX A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
Third Appellate District No. C003885
S010843

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

HORACE MELTON DELANEY, Appellant

Appellant's petition for review DENIED.

Lucas
Chief Justice

A true copy.

ATTEST: Robert Wandruff,
Deputy Clerk, Supreme Court
August 23, 1989

APPENDIX B

Court of Appeal
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

No. C003885

The People,
Plaintiff and Respondent,
v.
Horace Melton Delaney,
Defendant and Appellant.

Super.Ct.
No. 76231

OPINION OF THE THIRD
DISTRICT COURT OF APPEAL

Defendant was convicted by a jury of ten counts of presenting false Medi-Cal claims (Welf. & Inst. Code, § 14107) and one count of grand theft (Pen. Code, § 487, subd. 1). The jury also found true an enhancement for taking property in excess of $25,000 (Pen. Code, § 12022.6, subd. (a)). Defendant received a prison term of two years.

Defendant submits five contentions on appeal: (1) violation of his Sixth Amendment right to trial by a jury from the "vicinage" of the crime; (2) violation of the Eighth Amendment proscription against cruel and unusual punishment; (3) incompentence of counsel; (4) improper judicial comment; and (5) incorrect credit for presentence custody. All of these contentions lack merit. We shall affirm the judgment.

Defendant was a licensed optometrist who provided services primarily to patients with "low" or extremely poor vision. During 1984 and 1985 defendant had two Medi-Cal provider numbers corresponding to purported office locations in San Francisco. All Medi-Cal claims were submitted for processing to Computer Science Corporation (CSC), a Sacramento-based contractual agent of the

Department of Health Services (Department), for processing.

Defendant submitted several types of false claims upon which he was paid by the state approximately $26,000. Defendant had created a corporation named "Low Vision Services" through which he enlisted another optometrist, David Allen, as a consultant. The two men made a fee splitting agreement. Together defendant and Allen submitted 464 duplicate claims under different provider numbers, each claiming to be the refractionist who actually performed the billed services. Defendant and Allen worked together at two particular board and care retirement homes in the Long Beach area: Leisure Life and Barrington Villa.

Although defendant made only a single visit to each facility, he submitted

several duplicate claims for patients after altering the dates of service. Defendant also submitted claims for alleged patients who were absent from Barrington Villa on the date he did perform examinations there.

I

Defendant contends he should not have been tried on the grand theft charge in Sacramento County by a jury consisting of Sacramento County residents. He appears to contend that the grand theft occurred exclusively in San Francisco and Southern California. Defendant does not agree that the superior court in Sacramento lacked jurisdiction to try the case. (People v. Barney (1983) 143 Cal.App.3d 490, 493-494 and fn. 1.)

The jury vicinage requirement is based

upon the Sixth Amendment of the United States Constitution, which states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . ." This requirement is binding on the states through the Fourteenth Amendment. (People v. Jones (1973) 9 Cal.3d 546, 551.)

Sixth Amendment analysis is similar to that which would be appropriate under the jurisdictional statute for districts within California. (Pen. Code, § 781.)[1]

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[1] Penal Code Section 781 states: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more

"It is, of course, necessary in order to decide where the crime is committed to ascertain . . . what acts of the defendant constituted the violation." (United States v. Anderson (1946) 328 U.S. 699, 705 (90 L. Ed. 1529, 1533).) As charged here both crimes, presenting false claims and grand theft, involve the presentation of Medi-Cal claims to CSC in Sacramento.[2] Indeed, defendant concedes Sacramento County is the proper vicinage for trial of the former charge, but not the latter. There is, however, no significant legal distinction between the two crimes in respect to the vicinage requirement.

The theory of theft under the instant

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jurisdictional territories, the jurisdiction of such is in any competent court within either jurisdictional territory." This statute is to be construed liberally to permit jurisdiction in either of several districts (People v. Powell (1967) 67 Cal.

facts is theft by false pretenses. (Pen. Code, § 484, subd. (a).) The elements of false pretenses are a false representation believed by another who in reliance thereon parts with money or other thing of value intending to transfer ownership thereof. (People v. Ashley (1954) 42 Cal.2d 246, 259.) These elements occurred in Sacramento at CSC, the Department or the Office of the Controller where defendant present fraudulent claim forms and the victim disbursed the money to defendant. In any event the offense need not occur entirely within Sacramento County in order to mmet the Sixth Amendment vicinage requirement. (Lane v. State (1980) 388 So.2d 1022, 1028 (a defendant charged with murder in Florida

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2d 32, 62-63; People v. Kellett (1982) 134 Cal.App. 3d 949, 956-957).

[2] Welfare and Institutions Code Section 14107 states: "Any person who, with intent to defraud, presents for allowance or

could be tried there although victim actually died in Alabama); State v. Harrington (1969) 260 A.2d 692, 698 (a defendant charged with extortion in Vermont could be tried there although some of the requisite acts occurred in New Hampshire).)

II

Defendant contends his two-year prison sentence amounts to "cruel and unusual punishment" prohibited by the Eighth Amendment of the United States Constitution. Defendant actually makes two claims. One is that he should have been placed on probation because his probation report so recommended.

The trial court received and considered

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payment any false or fraudulent claim for furnishing services or merchandise, knowingly submits false information for the purpose of obtaining greater compensation than that to which he is legally entitled for furnishing services or merchandise, or

the probation report and numerous letters submitted in favor of leniency toward defendant. Probation was nevertheless rejected. A court is under no duty to adopt the recommendations of a probation officer. Indeed, having considered them, the trial court "'may reject in toto the report and recommendation of the probation officer.'" (People v. Warner (1978) 20 Cal.3d 678, 683.)

Second, defendant contends he was singled out for unusually harsh treatment because of his status as a doctor of optometry.[3] Denial of probation, however, rests within the broad discretion of the trial court. This discretion will not be

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knowingly submits false information for the purpose of obtaining authorization for furnishing services or merchandise under this chapter or Chapter 8 (commencing with Section 14200) is punishable by imprisonment in the county jail not longer than

disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary and capricious manner. (People v. Edwards (1976) 18 Cal.3d 796, 807.) No evidence was set forth to indicate a prison sentence was arbitrary, discriminatory or unusual in any way.

Defendant committed a series of serious sophisticated crimes over the course of a year and a half during which he stole over $26,000. Under the circumstances, probation was highly unlikely. (Cal. Rules of Court, rule 414(c)(1).) Even so Defendant's sentence could have been much more severe. Exercising leniency, the trial court ordered the terms for defendant's

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one year or in the state prison, or by fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment. The enforcement remedies provided under this section are not exclusive and shall not preclude the use of any other criminal or

numerous convictions for presentinf false claims to be served concurrently with the term for grand theft.

III

Defendant contends he received ineffective assistance of counsel. He provides nothing to support such a claim on appeal. Defendant merely points to counsel's stipulation to the admission of certain documentary evidence, alleged failure adequately to prepare regarding an item of discovery, and permitting defendant to testify.

Defendant bears the burden of demonstrating not only that counsel's performance was deficient, but also that

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civil remedy."

[3] Defendant's citation to Robinson v. California (1962) 370 U.S. 660 (8 L.Ed.2d 758) for support of this proposition is ludicrous. Robinson was convicted for his

defendant was prejudiced by the deficiency. (People v. Ledesma (1987) 43 Cal.3d 171, 217.) Thus, "(t)he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Strickland v. Washington (1984) 466 U.S. 668, 694 (80 L. Ed.2d 674, 698).) Defendant has shown neither.

Defendant urges counsel was negligent in stipulating to the admission into evidence of copies of signed warrants made out to defendant, a collection of Medi-Cal claims sent to CSC by defendant, and a copy of the court's exhibit list as

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status as a drug addict. (Id., at p. 667 (8 L.Ed.2d at p. 763).) Defendant was convicted for defrauding the state. Had Robinson been a doctor he would have fared no worse, nor has defendant fared any worse because he is a doctor. A few

an aid to jury deliberations. Defendant fails to suggest any conceivable basis upon which the first two sets of documents could have been kept from the jury and we know of none. The exhibit list was merely a neutral aid for the jury in keeping track of the considerable mass of evidence. Defense counsel was not deliquent in joining the stipulation.

Defense counsel was also allegedly incompetent in failing before trial to review the original of a document which had been altered by defendant's employee Cind-el Dawson. The dates on a Medi-Cal form had been changed on the original by "paste-overs" which could not be discerned

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doctors are also criminals; most are not.

on the photocopy provided defense counsel in pretrial discovery. Defense counsel was not alerted to the existence of the original by either the prosecutor or previous counsel. At trial defense counsel conceded that admission into evidence of the original copy was "highly incriminating." Defendant points out the original copy had supposedly been available to counsel in Sacramento and counsel could perhaps have become aware of it by careful reading of the investigator's report that was provided with pretrial discovery.

The record on appeal is inadequate to establish professional delinquency on the part of defense counsel in respect to the original document with the "paste-overs." The unsworn statements of

respective counsel establish only that considerable uncertainty and confusion prevailed regarding this document. Moreover, defendant has failed to suggest how the outcome of the trial would have been altered to his benefit had defense counsel been fully conversant with the original "paste-over" document. There is no contention this incriminating evidence either could have been kept from the jury or adequately explained away.

Defendant claims that defense counsel should have dissuaded him from testifying at trial because his testimony unwittingly undercut his Sixth Amendment appellate contention by admitting his presence in Sacramento County. However, rejection of defendant's Sixth Amendment contention, ante, pages 3-5, is in no way dependent upon

defendant's physical presence in Sacramento County.

IV

Defendant contends the trial court erred by interposing an objection to the prosecutor's cross-examination of defendant. We do not comprehend how the objection could have deprived defendant of a defense.

The prosecutor asked defendant: "Has someone told you that it was a defense to the crime for which you have been charged, that which you state that you estimated, which you say that you submitted the claim, but you did not think you were going to be paid? Why would you continue after receiving checks -- (?)" The court thereupon interjected: "Objection. Argumentative."

The court properly halted the prosecutor's second question launched

before defendant had an opportunity to answer the first, if for no other reason than to avoid presenting confusing testimony to the jury. The court's objection did not deprive defendant of the opportunity to explain his state of mind or his intent. Indeed, on redirect examination defendant undertook to explain why he did not believe he would be paid on his submitted claims.

V

Defendant contends credit for presentence custody time was calculated improperly. Defendant's request, however, for "eighteen days for time served plus nine days of good time/work time days, for a total of twenty-seven days" is precisely what the trial court awarded. Defendant's other contentions regarding presentence custody credit are not properly before

this court.[4] He should address these to the trial court. (People v. Hyde (1975) 49 Cal.App.3d 97, 102.)

The judgment is affirmed.

Puglia
Presiding Judge

We concur:

Evans
Judge

Marler
Judge

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[4] Defendant cites to a discrepancy in the probation report in which a stay in Sacramento County Jail from November 2, 1985, to November 27, 1985, is denoted as two total days in custody. The first date is likely a typographical error

A true copy.

ATTEST: Robert L. Liston
Clerk of the Third District
Court of Appeal
May 23, 1989

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as the search of defendant's office occurred on November 22, 1985, and defendant was arrested on November 26, 1985.